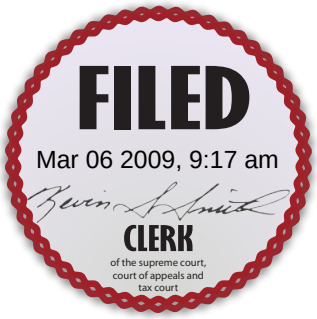

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IN THE
COURT OF APPEALS OF INDIANA

GREGORY PAYNE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 71A03-0803-PC-102
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0204-FA-16

March 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Gregory Payne, pro se, appeals from the post-conviction court's denial of his petition for post-conviction relief. Payne raises numerous issues for our review, which we consolidate and restate as the following two issues:

1. Whether his freestanding claims of error during his trial and sentencing are reviewable.

2. Whether he was denied the effective assistance of trial counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts underlying this appeal were stated in our opinion on Payne's direct appeal:

> On March 8, 2001, Payne was driving in South Bend when he saw seventeen-year-old R.W. and offered to give him a ride. R.W. accepted. Payne drove to a liquor store and purchased some alcohol, which he and R.W. drank. Payne then pulled onto a side street and he and R.W. began "fooling around . . . ." R.W. told Payne that he wanted to stop, but Payne threatened to choke R.W. and forced him to submit to anal intercourse.
>
> The State did not file charges against Payne until April 1, 2002, when it charged him with criminal deviate conduct as a Class A felony, criminal confinement as a Class B felony, and two counts of sexual battery as Class C felonies. Payne was charged simultaneously with two counts of child molesting as Class A felonies and one count of Class C felony criminal confinement for a separate incident involving a thirteen-year-old boy. Meanwhile, on August 24, 2001, Payne was sentenced to three years['] incarceration for unrelated battery and resisting law enforcement convictions. He finished serving his sentence for these convictions on or near February 2, 2003, but he remained incarcerated awaiting trial in this case.
>
> On July 21, 2003, Payne's jury trial was scheduled to begin. After voir dire, however, Payne agreed to plead guilty to the charges related to R.W.: Class A felony criminal deviate conduct, Class B felony criminal confinement, and two counts of Class C felony sexual battery. The State

> agreed to dismiss the child molesting and confinement charges related to the other child. The plea left sentencing entirely within the trial court's discretion. [Footnote 1: There appears to be no written plea agreement in this case. When Payne originally pled guilty, the State indicated that it would "make no recommendation as to sentencing." However, at the sentencing hearing the trial court asked, "I trust that there was no limitation of the State's ability to argue. Or am I wrong?" Defense counsel responded, "No. The parties are free to argue, Your Honor." The State then recommended a fifty-year term.] On October 9, 2003, the trial court sentenced Payne to fifty years for the criminal deviate conduct conviction and eight years for each of the sexual battery convictions, all to run concurrently; no sentence was entered on the criminal confinement count. The trial court also gave Payne 262 days pre-sentencing incarceration credit. Payne now appeals the sentence and the credit time calculation.

Payne v. State, 838 N.E.2d 503, 505-06 (Ind. Ct. App. 2005) (citations omitted), trans. denied ("Payne I"). In his direct appeal, Payne questioned only whether his sentence was inappropriate under Indiana Appellate Rule 7(B) and whether the trial court properly calculated the amount of presentencing credit to which he was entitled. We reviewed each of those issues and affirmed Payne's sentence.

On March 27, 2006, Payne filed his petition for post-conviction relief. Payne amended that petition on October 10, 2006, and the post-conviction court held a hearing on his petition on January 24, 2007. On February 6, 2008, the post-conviction court entered its findings of fact and conclusions of law granting Payne's petition in part and denying it in part. Specifically, the court granted Payne's request for resentencing without the State being permitted to give a recommendation and, in all other respects, denied Payne's petition. On March 4, 2008, Payne filed his notice of appeal from the

post-conviction court's order. On March 11, the post-conviction court resentenced Payne, without a recommendation from the State, to an aggregate term of fifty years.[1]

DISCUSSION AND DECISION

Standard of Review

Payne contends that the post-conviction court erred in its partial denial of his petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Saylor v. State, 765 N.E.2d 535, 547 (Ind. 2002). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Saylor, 765 N.E.2d at 547. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." Id.

As detailed below, Payne asserts numerous grounds for error on appeal. Each of those allegations, however, falls into one of two categories. Payne either raises a freestanding claim of error to his conviction and sentence or Payne contends that he was

[1] On June 17, 2008, Payne filed a motion to consolidate this appeal with his appeal from the post-conviction court's resentencing order, which was filed under appellate cause number 71A03-0805-CR-227. We denied Payne's motion to consolidate on July 10. Payne filed similar motions in August and again in December, both of which were also denied.

denied the effective assistance of trial counsel. We address Payne's arguments accordingly.

Issue One: Freestanding Claims of Error

We first note that many of Payne's allegations of error are not reviewable. As we have explained:

> "The post-conviction relief process is also open to the 'raising [of] issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time.' Kimble v. State, (1983) Ind., 451 N.E.2d 302, 303-304. It is not, however, open to the raising of issues available to a petitioner upon his original appeal. Brown v. State, (1974) 261 Ind. 619, 308 N.E.2d 699. Errors not assigned at the trial level nor argued on direct appeal are deemed waived in the context of post-conviction relief. Frith v. State, (1983) Ind., 452 N.E.2d 930; Howland v. State, (1982) Ind., 442 N.E.2d 1081. 'To unreservedly hold the door open for appellate review under the post conviction remedy rules, regardless of the circumstances which preceded, would perforce characterize post conviction relief as some sort of 'super-appeal' contrary to its intended function.' Langley v. State, (1971) 256 Ind. 199, 210, 267 N.E.2d 538, 544."

Lindsey v. State, 888 N.E.2d 319, 323 (Ind. Ct. App. 2008) (quoting Bailey v. State, 472 N.E.2d 1260, 1262-63 (Ind. 1985)), trans. denied. That is, the only issues available to a defendant in a post-conviction proceeding are issues expressly "'within the purview of the post-conviction rules.'" Id. at 323 (quoting Bailey, 472 N.E.2d at 1262-63). A defendant in a post-conviction proceeding may raise an issue for the first time in his or her petition "only when asserting either (1) deprivation of the Sixth Amendment right to effective assistance of counsel, or (2) an issue demonstrably unavailable to the petitioner at the time of his or her trial and direct appeal." Id. at 325 (quotations, citations, and alterations omitted).

In his amended petition for post-conviction relief, Payne raised the following issues for the first time: (1) whether his plea agreement was invalid in its entirety because it was not in writing; (2) whether the State's recommendation of a fifty-year sentence to the trial court was in violation of the plea agreement; and (3) whether the trial court denied Payne "'Equa[l] Protection' and 'Application' of the law." See Appellant's Supp. App. at 2, 8-10. Payne also asserted that the trial court erroneously accepted his plea without a sufficient factual basis. See Appellant's Brief at 26 (order appealed from). Similarly, on appeal, Payne contends that the post-conviction court erred in denying relief on those grounds. And, although not raised in his amended petition for post-conviction relief, Payne argues for the first time on appeal[2] that the post-conviction court erred in not addressing whether the trial court violated his double jeopardy rights when it entered its judgment of conviction and sentence against him.

Payne makes no attempt to demonstrate that any of those issues were unavailable to him at his trial or during his direct appeal. See Payne I, 838 N.E.2d at 506 n.1 (noting that some of those issues were available, but not challenged, on direct appeal). And insofar as those issues are not framed in the context of ineffective assistance of counsel, but instead are "free standing claim[s] of fundamental error," they are not available for our review of the post-conviction court's order. Lindsey, 888 N.E.2d at 322 (quotation omitted). Accordingly, Payne has waived each of those issues, and we will not review them. See id. at 325.

[2] As near as we can tell this issue is raised for the first time in this appeal. Payne has not cited to portions of his appendices or the record that would indicate otherwise. See Ind. Appellate Rule 46(A)(8)(a). However, whether this issue is being raised for the first time in this appeal or was instead raised for the first time to the post-conviction court is irrelevant to our disposition of it.

Issue Two: Effective Assistance of Counsel

Payne also asserts that he was denied the effective assistance of trial counsel, in violation of his Sixth Amendment rights. As we have often stated:

> A claim of ineffective assistance of counsel must satisfy two components. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the "counsel" guaranteed by the Sixth Amendment. Id. at 687-88. Second, the defendant must show prejudice: a reasonable probability (i.e., a probability sufficient to undermine confidence in the outcome) that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Brown v. State, 880 N.E.2d 1226, 1230 (Ind. Ct. App. 2008), trans. denied.

In his amended petition for post-conviction relief, Payne asserted that he was denied the effective assistance of trial counsel for the following reasons: (1) counsel permitted Payne to enter into an oral plea agreement; (2) counsel advised Payne that "by law . . . [Payne] could only be found guilty and sentenced on the criminal confinement charge and nothing else," Appellant's Supp. App. at 6-8, 17[3] (emphasis removed); and (3) counsel advised the trial court that the State was permitted to recommend a sentence to the court. Payne also argued to the post-conviction court that he was denied the effective assistance of trial counsel because his counsel allowed Payne "to plead with [an] insufficient factual basis." Appellant's Brief at 26. Finally, on appeal Payne argues for

[3] Payne also asserted that his trial counsel ineffectively "failed to apprise himself of the law and facts [relevant] to his client's conviction," Appellant's Supp. App. at 17, but on appeal Payne does not distinguish that purported issue from the criminal confinement issue. Thus, we likewise treat the two issues as identical.

the first time[4] that his trial counsel was ineffective for the additional reason that he "fail[ed] to inform the court . . . that [it] lacked authority to impose sentence by implementing the deadly weapon element [sic]." Id. at 13

As an initial matter, we note that an argument may not be raised for the first time on appeal from a post-conviction order. See, e.g., Canaan v. State, 683 N.E.2d 227, 235 n.6 (Ind. 1997), cert. denied, 524 U.S. 906 (1998). As such, we will not review Payne's assertion that his trial counsel ineffectively failed to inform the trial court of its sentencing authority with regards to "implementing the deadly weapon element." See Appellant's Brief at 13. We also note that Payne's appeal of the post-conviction court's resentencing order is pending in this court under a different cause number, and we have thrice denied Payne's attempts to consolidate that appeal with this one. Hence, insofar as Payne asserts that the State violated the terms of his guilty plea during resentencing "by initiating the procurement of a witness impact statement without provocation with intent to influence the sentence and for arguing that Payne could receive more than 50 years," id. at 8, 21-23, that argument is not properly before this court under this cause number. Finally, Payne's assertion that the post-conviction court erred in denying him relief because his trial counsel permitted the State to recommend a sentence to the trial court is not well taken. The post-conviction court granted Payne relief on those grounds by resentencing him without a recommendation from the State. Again, we will not review that or related arguments under this cause number.

[4] Again, as near as we can tell this issue is raised for the first time in this appeal, as Payne has not cited to portions of his appendices or the record that would indicate otherwise. See Ind. Appellate Rule 46(A)(8)(a).

In sum, then, the following arguments are properly before this court in this appeal: whether Payne was denied the effective assistance of trial counsel when his counsel (1) permitted Payne to enter into an oral plea agreement; (2) advised Payne that "by law . . . [Payne] could only be found guilty and sentenced on the criminal confinement charge and nothing else," Appellant's Supp. App. at 6-8 (emphasis removed); and (3) allegedly permitted Payne to plead guilty without a sufficient factual basis to the charges to which Payne was pleading. We address those three arguments in turn.

A. Oral Plea Agreement

Payne's first issue that we will review is whether he was denied the effective assistance of trial counsel when his counsel permitted Payne to orally plead guilty to some of the felony charges against him. Indiana Code Section 35-35-3-3 requires pleas of guilty to felony charges to be in writing, which the State does not dispute did not happen in Payne's case. Nonetheless, "in order to upset a conviction based on a claim of ineffective assistance of counsel, a petitioner who pleads guilty must show a reasonable probability that he would not have been convicted if he had gone to trial." Segura v. State, 749 N.E.2d 496, 498-99 (Ind. 2001) (discussing State v. Van Cleave, 674 N.E.2d 1293, 1306 (Ind. 1996)).

Here, Payne asserts that his trial counsel's failure to comply with Indiana Code Section 35-35-3-3 prejudiced him in the following three ways:

> (1) a plea being entered that Payne did not agree to as counsel persuaded Payne to believe he could only be convicted and sentenced for criminal confinement, a Class B felony; (2) breach of contract by the State which prohibited the State from making argument or recommendation of sentence, which they did do and was consequently imposed [sic]; (3) that Payne's

> right to due process and equal protection of the law was denied due to his plea not being in written form . . . .

Appellant's Brief at 16. Payne's first argument is indistinguishable from his second ground for ineffective assistance of trial counsel, and we discuss it below. Payne's second argument is moot because the post-conviction court granted his petition for relief on those grounds and resentenced him. And Payne's third argument in no way demonstrates a reasonable probability that he would not have been convicted if he had gone to trial. As such, Payne cannot demonstrate that his trial counsel's failure to adhere to Indiana Code Section 35-35-3-3 prejudiced him. See Brown, 880 N.E.2d at 1230.

B. Criminal Confinement

Payne next asserts that he was denied the effective assistance of trial counsel because his counsel informed Payne that he could "only be found guilty and sentenced on the criminal confinement [charge] and nothing else." Appellant's App. at 25. Again, the State does not dispute that Payne's trial counsel argued to the trial court that Payne could only be sentenced on the criminal confinement charge. Still, we must affirm the post-conviction court's rejection of Payne's argument.

Payne's only allegation of prejudice from his trial counsel's conduct is the following statement:

> Payne contends that if it was not for counsel's bad advise [sic] . . . Payne would not have taken a plea. . . . Had Payne not received the bad advise [sic], had Payne known there was no benefit to pleading guilty,[5] Payne would not have taken the plea agreement.

[5] We note that, in light of the charges dismissed by the State pursuant to Payne's plea agreement, Payne's sentencing exposure was reduced by 108 years.

Appellant's Brief at 20. But, again, to demonstrate prejudice from his trial counsel's action, Payne "must show a reasonable probability that he would not have been convicted if he had gone to trial." Segura, 749 N.E.2d at 499. Payne's arguments that he simply would not have pleaded guilty do not reasonably demonstrate that he would have been acquitted at trial of the charges to which he confessed. As such, Payne's alleged error cannot stand.

C. Factual Basis for Plea

Finally, the last reviewable issue Payne raises in this appeal is whether his trial counsel properly secured a factual basis for Payne's guilty plea. "The factual basis requirement primarily ensures that when a plea is accepted there is sufficient evidence that a court can conclude that the defendant could have been convicted had he stood trial." Butler v. State, 658 N.E.2d 72, 76 (Ind. 1995). "[A] finding of factual basis is a subjective determination that permits a court wide discretion." Id. "[A] factual basis exists when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty." Id. at 77. "Trial court determinations of adequate factual basis . . . arrive here on appeal with a presumption of correctness." Id.

Here, Payne asserts that the State failed to establish a factual basis for one element of two different charges to which he was pleading guilty. Specifically, Payne contends that there was an insufficient factual basis to establish that he forced R.W. to submit to Class A felony criminal deviate conduct under the imminent threat of deadly force. See I.C. § 35-42-4-2(b)(1). Payne also argues that there was insufficient evidence of serious

bodily injury to support the charge of criminal confinement, as a Class B felony. See I.C. § 35-42-3-3(b)(2)(B).

Payne's arguments in this appeal are undermined by his testimony during his guilty plea hearing:

> THE COURT: All right. Before you could have been convicted—we separated these counts out. So let's talk about today's counts.
>
> Before you could have been convicted of what I call Count I today, but was really the criminal deviate conduct [charge], the State would have had to prove that back on March 8, 2001, that you forced [R.W.] to submit to deviate sexual conduct.
>
> Let me explain to you what deviate sexual conduct means in the law. It means an act involving the sex organ of one person and either the mouth or the anus . . . of another person; or the penetration of the sex organ or anus of another person . . . by an object.
>
> They would have had to prove that you required that young man to submit to deviate sexual conduct. They'd have to prove at the time that you did so that you did that by threat of the use of deadly force.
>
> Now can you just share with me what the allegation on the deadly force is?
>
> MS. LINDKE [for the State]: Threats to kill him, Your Honor, and the display of a weapon.
>
> THE COURT: Okay.
>
> MR. PAYNE: Correct.
>
> THE COURT: So they'd have to prove, number one, that you forced the young man to submit to that act of deviate conduct. They'd have to prove that at the time you either did that by means of a deadly weapon or by threatening deadly force.
>
> Do you want me to tell you what deadly force means? It means threatening force that would create a substantial risk of serious bodily injury to someone else.
>
> * * *
>
> MR. PAYNE: Okay. I understand; I understand.
>
> * * *

THE COURT: Let me read the charges to you, and we'll go over it.

The count that we're talking about says that on or about March 8, 2001, in St. Joseph County, that you knowingly caused [R.W.] to submit to deviate sexual conduct when he was—that means [R.W.]—compelled by the imminent threat of deadly force.

That's what they're saying about the criminal deviate conduct, and that's what you're admitting when you plead guilty.

MR. PAYNE: Okay. I admit that.

* * *

THE COURT: And did you, during that day or on that occasion, knowingly remove [R.W.] from one place within St. Joseph County to another by threatening force upon him?

MR. PAYNE: Now this is kind of, you know, hard to explain. It's not—the way they wrote that up, it's not right, that part right there.

THE COURT: All right. Were you armed with a deadly weapon when this whole incident occurred?

MR. PAYNE: No. That's not what happened. But the force, yes.

THE COURT: Are you saying that you did not have a weapon of any sort on the occasion that you were with [R.W.]?

MR. PAYNE: No.

* * *

THE COURT: Do we need to go back and discuss the nature of the offenses as it relates to the confinement or otherwise? . . .

MS. LINDKE: We are looking at the statute.

Your Honor, in order for it to be a B felony, there's no threat of deadly force. There is a possibility of serious bodily injury, extreme pain.

Under the circumstances and in talking to [R.W.], I believe that there could be a basis for that, if Mr. Payne agrees that, by forcing him to commit to what he did, that that resulted in extreme pain to [R.W.]

I would be willing to amend to reflect that if he is willing to do that.

* * *

MR. PAYNE: Okay. But what happened is, you know, we were on Lincoln Way. And I asked him did he want a ride, and he got in the car.

THE COURT: Let me ask you this, sir. At any point did you display what is a handgun or what appeared to be a handgun?

MR. PAYNE: No. I never had a handgun.

* * *

MR. KAUFFMAN [for Payne]: Judge, I think this will resolve any issues. As charged—I think the State's prepared or willing to do this; maybe I'm wrong.

But with regard to the confinement, as a B, I think Mr. Payne would agree . . . that part of that subsection that enables it to be charged as a B is if there's serious bodily injury to the person. Not the confining person or the person that's responsible for the taking, but the individual that was taken.

And he's agreed with me that that's factually what did occur after the confinement was started. Meaning that, even with his comment that he got in the car for a ride, there was some point in time when [R.W.] wanted to go and was unable to. And then there was some serious bodily injury that occurred after that; namely, to his [anus].

* * *

THE COURT: Okay. Do you understand what they are trying to do?

MR. PAYNE: No; not really.

THE COURT: Let me tell you what they're trying to do.

MR. PAYNE: All right.

THE COURT: . . . What they're trying to accomplish . . . is a disposition of this case that will not expose you to the additional counts. . . .

They are trying to determine whether there is a set of facts that constitutes the offenses that they're trying to resolve that you're willing to admit that you did.

And when your lawyer talks about the criminal confinement, and he's talking about there either has to be a confinement by deadly weapon or resulting in serious bodily injury.

Mr. Kauffman is telling me that he expects that you will tell me that, in the course of your taking this young man from point A to point B and

confining him, that you committed an act; that is, caused him extreme pain, which is the serious bodily injury. And that has to do with rectal penetration.

MR. PAYNE: Okay. I understand that part. And I agree with that portion over there.

THE COURT: Okay.

* * *

THE COURT: . . . But the other part of the statute that makes criminal confinement a B felony is where you cause serious bodily injury, including extreme pain, to the person you're confining.

You aren't disagreeing that what you did caused this man extreme pain, are you?

MR. PAYNE: No. . . .

THE COURT: Will you accept that as true?

MR. PAYNE: I accept that. . . .

* * *

THE COURT: . . . Can you tell me where this all began and what happened that makes you guilty[?]

MR. PAYNE: On March 28 on Lincoln Way—

THE COURT: March 8?

MR. PAYNE: Yes. . . . In 2001 on Lincoln Way.

THE COURT: In South Bend?

MR. PAYNE: In South Bend.

THE COURT: Okay.

MR. PAYNE: [R.W.], I asked him did he want a ride. He said yeah, and he jumped in the car.

At that particular time, I think we was over there by . . . Olive and Lincoln Way.

* * *

THE COURT: Did you know this young man before that day?

MR. PAYNE: No. I didn't really know him. I had seen him, but I didn't know him.

So we rode to the liquor store, got some liquor. I asked him what he wanted. He said the hard liquor.

So we drank some liquor and all of this. Then we went from one place to another place and—

THE COURT: You went from the liquor store to where?

MR. PAYNE: To a side street . . . somewhere over there by Thomas and Chapin.

* * *

MR. PAYNE: Then we got, we got drunk, were drinking.

And we started fooling around, and he said no. And then I kept going and—

THE COURT: What do you mean kept going?

MR. PAYNE: Kept performing sexually.

THE COURT: What did you do?

MR. PAYNE: Penetrated.

THE COURT: Now if you did it, you've got to be able to tell me what you did. What was it you did?

MR. PAYNE: Yeah, that's what I meant. I penetrated his anus . . . .

* * *

THE COURT: You stuck your penis . . . into his anus?

MR. PAYNE: Right.

THE COURT: Okay. Did he want you to do that?

MR. PAYNE: Well, we did it; and then he said no. Then I kept going . . . until I ejaculated.

* * *

THE COURT: Did you threaten force in doing so?

MR. PAYNE: Yes. After he said no, yes.

THE COURT: What did you threaten him about? What did you say to him?

MR. PAYNE: Oh, I don't know exactly what it was. But I told him, you know, if he don't do it, then, you know, I might choke him or something like that.

THE COURT: Are you admitting to me that what you said to him to get him to allow you to have sexual intercourse or anal intercourse is that you threatened him with harm?

MR. PAYNE: Yes.

THE COURT: They are going to tell me that the boy will say you threatened to kill him. Is it possible you said that?

MR. PAYNE: It's possible, because we were drinking.

* * *

MS. LINDKE: And if [R.W.] . . . would say that those acts, that anal penetration, caused him extreme pain, would you have any reason to disagree with that, that it really hurt him a lot?

MR. PAYNE: If he said that, I can't say no. Because it's not my body; that's his body. Only he can determine what he feels.

Guilty Plea Transcript at 19-21, 23-24, 27-28, 30-36, 39-42, 51. In light of that testimony, we cannot say that there was an insufficient factual basis as Payne now alleges. Payne expressly and repeatedly acknowledged that he threatened to "choke" R.W. if R.W. did not submit to the criminal deviate conduct, and that it was "possible"

that he "threatened to kill" R.W. Id. at 42. Payne also admitted that his criminal confinement of R.W. "caused [R.W.] extreme pain." Id. at 51. Accordingly, Payne cannot establish that his trial counsel rendered ineffective assistance for purportedly failing to secure a sufficient factual basis for Payne's guilty plea to those two charges.

Conclusion

In sum, the vast majority of Payne's allegations of error are not reviewable in this appeal. We will not review freestanding claims of error on appeal from the post-conviction court's judgment. Lindsey, 888 N.E.2d at 322-25. We will also not review issues raised for the first time in this appeal. See, e.g., Canaan, 683 N.E.2d at 235 n.6. And insofar as Payne requests this court to review issues related to his resentencing, those issues are pending in this court under a different cause number and are not properly before this court in this cause. Finally, Payne's allegations of ineffective assistance of trial counsel must fail. The post-conviction court's judgment is affirmed.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.